No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

The appellant's jurisdictional statement sets forth substantially the pleadings and facts upon which are based the jurisdiction of the District Court in this case and of this Court on appeal.

Statement of Facts.

This action was brought by appellee to recover from the appellant, as surety, damages sustained by appellee as a result of a breach of the obligations of the faithful performance bond guaranteeing the faithful performance of a subcontract for the furnishing of materials and performance of work at the Davis-Monthan Airfield at Tucson, Arizona.

On January 25, 1945, United States of America, through the Engineering Department thereof, as owner, entered into a contract with appellee, as general contractor, for the furnishing of materials and performing of work for the construction of taxiways, warmup and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities necessary at said Davis-Monthan Airfield.

Under date of February 7, 1945, appellee, as general contractor, and Duque & Frazzini, a co-partnership, as subcontractors, entered into a subcontract whereby the subcontractors agreed to perform certain of the work and furnish certain of the material required of said appellee under its said contract with the United States of America. [This subcontract is set out at Tr. pp. 17 to 31, incl.]

By the terms of said subcontract, said subcontractors agreed to furnish 100%, labor, material and performance bond. [Article XXII of Subcontract, Tr. p. 28.] In compliance with said requirement, the subcontractors, as principal, and appellant, as surety, made, executed and delivered to appellee a faithful performance bond in the penal sum of $101,745.55 for the faithful performance of the work contracted to be performed under the terms of said subcontract. [The bond is set out at Tr. pp. 32 to 36, incl.]

It is provided by the terms of said subcontract that the subcontractors shall furnish all materials, supplies and equipment, except as otherwise therein provided, and perform all labor required for the completion of said work

in accordance with the provisions of the original contract and of the specifications and plans referred to therein and under the direction and to the satisfaction of the principal's engineer or other authorized representative of said work. [Article I of the Subcontract, Tr. p. 18.]

It is further provided by the terms of the subcontract that the subcontractors shall, at their own expense, provide workmen's compensation insurance and insurance against liability for injury to persons or property and, if the subcontractors failed to do so, the general contractor is authorized to provide the same and to deduct the amounts of premiums payable therefor from moneys due the subcontractors. [Article VI, Tr. p. 20.]

It is further provided in said subcontract that the subtractors shall promptly make payment to all persons supplying them with labor, materials and supplies and any such payments not made by the subcontractors when due may be made by the general contractor and the amounts thereof deducted from any moneys due the subcontractors. [Article XI, Tr. p. 21.]

It is further provided in said subcontract that the subcontractors are to submit weekly payrolls by Monday night of each week for the previous week which closes on Saturday at midnight to the general contractor and the general contractor to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to the subcontractors, which amounts are to be deducted from the amounts earned. [Article XXI, Subsection 3, Tr. p. 25.]

It is provided in said bond furnished by appellant, as surety, after referring to said subcontract of date February 7, 1945, that the condition of the obligation of said bond is such that if the principal "shall faithfully perform the work contracted to be performed under said contract, and shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in or furnishing appliances, teams or power contributing to such work, then this obligation shall be void; otherwise to remain in full force and effect." [Tr. p. 32.]

The subcontractors commenced erecting one of their plants about February 11, 1945 [Tr. p. 770], and started operating their first plant between the 20th and 25th of February, 1945. [Tr. p. 572.] Appellee, under said subcontract with the subcontractors, reserved the right to compel the subcontractors to move in another plant if they failed to prosecute the work with sufficient equipment. [Article XII, Tr. p. 21.]

On April 5, 1945, pursuant to said Article XII of the subcontract, appellee notified the subcontractors in writing, a copy thereof being sent to appellant, that the subcontractors move in additional equipments to insure proper completion of their contract. [Plaintiff's Exhibit No. 4, Tr. p. 463.]

The subcontractors, having failed to comply with said notification of April 5, 1945, appellee again, on April 27, 1945, notified them and appellant, as their surety, of the failure on the part of the subcontractors to comply with

the requirements of said subcontract. [Plaintiff's Exhibit No. 5, Tr. p. 404.]

The subcontractors and appellant were again notified on May 23, 1945, that said subcontractors were failing to prosecute the work as required in the subcontract. [Plaintiff's Exhibit No. 8, Tr. p. 471.]

The subcontractors and appellant were further notified on June 1, 1945, and again on June 8, 1945, of the failure of the subcontractors to comply with the requirement of the subcontract. [Plaintiff's Exhibits Nos. 10 and 12, Tr. pp. 477 and 482, respectively.]

The evidence shows and the Court so found that the subcontractors abandoned the work on June 8, 1945. [Finding XIX, Tr. p. 203.]

On June 9, 1945, appellee made written demand on the subcontractor to proceed with said work and forwarded a copy thereof to appellant. [Plaintiff's Exhibit No. 13, Tr. p. 491.]

On June 11, 1945, appellee notified appellant that it, as surety, take such action as it may deem proper and until it did so, appellee, upon demand of the War Department, will proceed with the work for appellant's benefit and will comply with all reasonable instructions from it. [Plaintiff's Exhibit No. 14, Tr. p. 494.]

Having failed to receive a reply to its said communication of date June 11, 1945, appellee again communicated with appellant on June 14, 1945, stating that unless it is notified of other plans appellant had to complete said sub-

contract, appellee will assume it is the desire of appellant that appellee complete the same for appellant as the insurer of the subcontract. [Plaintiff's Exhibit No. 16, Tr. p. 500.]

On June 23, 1945, appellee received a letter from John E. McCall, attorney for appellant, merely informing appellee, in effect, that if appellee had failed to perform any of the conditions precedent required in the bond, without stating that appellee had in fact so failed, it can have no valid claim against the surety. [Plaintiff's Exhibit No. 17, Tr. p. 502.]

On June 29, 1945, appellee's attorney, answering said letter of Mr. McCall, advised him that appellee is merely striving to minimize the loss or damage to appellant and its assured and, at the same time, complete a vital defense project as required by the Federal Government. [Plaintiff's Exhibit No. 18, Tr. p. 504.]

Thereafter, appellee continued producing the material required under said subcontract and completed the same October 25, 1945. [Tr. p. 616.]

This action was commenced by appellee to recover from appellant (1) amounts paid out for labor, equipment and supplies for the account and benefit of the subcontractors in connection with the prosecution of said work by them up to the abandonment thereof on June 8, 1945, and (2) the reasonable cost of completing the work covered by the subcontract after its abandonment on June 8, 1945, by the subcontractors.

Judgment was rendered in favor of appellee, from which judgment the appellant surety has appealed.

ARGUMENT.

I.

Answer to Appellant's Contentions, First, That the Complaint Fails to State a Claim Upon Which Relief Can Be Granted (Opening Brief, p. 25); **and Secondly, That Appellee Made Premature Payments.** (Opening Brief, pp. 37, 38 and 56.)

Each of the above contentions involves the same question as to whether or not appellee failed to comply with a condition precedent contained in the bond in making alleged premature payments or overpayments in excess of 90% of the engineer's estimate as specified in the subcontract.

In support thereof, appellant cites the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.*, 214 Cal. 384.

It is appellee's contention that the above cited case does not apply to the case at bar for the following reasons:

First: In the above cited case, the overpayment was made direct to the subcontractor while in the case at bar no payments were made direct to the subcontractors but were made direct to third parties furnishing labor, supplies or material or charged against the subcontractors on account of rental of equipment or supplies furnished by appellee to the subcontractors, all of which were used in the prosecution of said subcontract. [Tr. p. 322.]

Second: All payments made by appellee were within the term of the subcontract itself as found by the trial court [Finding No. VI, Tr. p. 190], which was not the situation in the above cited case.

Article VI of the subcontract required the subcontractors, at their own expense, to provide workmen's compensation insurance, insurance against liability for injury to persons or property and if they failed to do so, appellee was authorized by the subcontract to do so and charge same against subcontractors. [Tr. p. 20.]

Article XI of the subcontract required the subcontractors to promptly pay all persons supplying them with labor, materials and supplies and if they failed to do so appellee was authorized to do so and charge same against the subcontractors. [Tr. p. 21.]

Section 3, Article XXI of the subcontract required the subcontractors to submit weekly payrolls to appellee and appellee to pay labor, compensation insurance, public liability, property damage, Arizona employment insurance Federal Old Age, Excise Tax on Employers and other insurance on labor and charge same to the subcontractors. [Tr. p. 25.]

It is appellee's contention that the government contract, which is made a part of the subcontract [Article I, Tr. p. 18], the subcontract and the faithful performance bond executed by appellant, as surety, are to be considered as one instrument and constitute the contract between appellee, the subcontractors and appellant. The trial court made an express finding to this effect. [Finding V, Tr. p. 196.]

In *Roberts v. Security Trust and Savings Bank,* 196 Cal. 557, at page 566, the court said:

> "A bond may incorporate, by reference expressly made thereto, other contracts, in which case the bond and the contract should be read together and construed fairly and reasonably as a whole according to

the intention of the parties. (*Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 486 (129 Pac. 978, 979); *Smith v. Molleson, supra.*) Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope, or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as constituting an indivisible contract."

In *Pacific States Electric Co. v. U. S. F. & G. Co.*, 109 Cal. App. 691 (282 Pac. 812), at page 693, the court said:

"It is also elementary that a bond given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually made and executed the contract itself."

Appellant, itself, recognized that any overpayment for labor, materials or supplies were within the provisions of the subcontract. On May 24, 1945, appellee notified the subcontractors and appellant that it had, pursuant to Article XI of the subcontract, made labor payments, material payments and supply payments for the subcontractors but the amount of money earned by the subcontractors was not sufficient to meet the past advancements and demanded that they meet all present and future labor claims. [Plaintiff's Exhibit 9, Tr. pp. 474 to 476, incl.]

In reply thereto, appellant, through John E. McCall, its attorney, on June 7, 1945, stated:

"Your letter of May 24th, 1945, refers to Article XI of the Contract which provides that the subcontractors will pay for all labor and material, but you overlooked Section 22 of Article XXI of the Con-

tract which expressly provides that your client will pay, among other things, the weekly payrolls for labor." [Plaintiff's Exhibit 11, Tr. pp. 479, 480, 481.]

In *Pacific Coast Engineering Co. v. Detroit F. & S. Co.*, *supra*, on page 396, the court said:

> "We discover nothing to the contrary in the cases of *Siegel v. Hechler,* 181 Cal. 187 (183 Pac. 664), and *Burr v. Gardella,* 53 Cal. App. 377 (200 Pac. 493), as in those cases the facts show that the payments were made within the terms of the contract."

In *Burr v. Gardella,* 53 Cal. App. 377, at page 387, the court said:

> "Therefore, where, as we think the uncontradicted testimony of the plaintiff shows to be so in this case, the payments made were according to the requirement of the contract as to when certain payments should be made and were within the terms of the contract, and would consequently have to be made at some time, either by Keith or plaintiff or, to the extent of their liability, by the sureties, we do not think the payments so made are in fact premature within the fair and reasonable contemplation of the statute and the contract. In other words since the contract expressly provides that claims of the creditors must be paid when due and payable, it cannot be held that, if such payments are required to be made prior to the expiration of the thirty-five days after the completion of the contract and it becomes necessary for the contractor to pay them and it is impossible, from the extent of such obligations, to retain the twenty-five percent provided by the contract, the payment of them under such circumstances is such a violation of the terms

of the contract as to affect or change or impair the rights of the sureties, either in whole or in part. (*Bateman Brothers v. Mapel,* 145 Cal. 241, 243 (78 Pac. 734); *Hand Mfg. Co. v. Marks,* 36 Or. 523, (52 Pac. 512, 53 Pac. 1072, 59 Pac. 540); *Siegel v. Hechler, et al.,* 181 Cal. 187 (183 Pac. 664), *supra*).)"

In *Siegel v. Hechler,* 181 Cal. 187, at page 191, the court said:

> "It was also a violation of the terms of the bond whereby the surety undertook that Hechler should perform the covenants of the subcontract and save Siegel harmless against loss by reason of any demands or claims which might be made against him or the owner for labor or material upon the subcontract work and against loss which he might be put to by reason of liens filed or stop notices given to the owner. Hechler having failed, the only way by which Siegel could save himself harmless from such failure and free himself from the liability thus imposed was by paying the bills at once. . . . If he had not been able to pay these bills at the time and additional damage to him had followed therefrom, the surety would have had so much more to pay on the bond."

In the case of *Basich Brothers Construction Company, et al., v. United States of America, for the use of Turner, et al.,* No. 11353, decided by this court on December 26, 1946, involving the identical subcontract, this court held that appellee herein was liable, under the Miller Act, for labor, material and supplies furnished the subcontractors.

In *Seaboard Surety Co. v. Standard Accident & Ins. Co.*, 277 N. Y. 429 (117 A. L. R. 658 at page 661), the court said:

> "We have, then, a contract which obligated the subcontractor to provide materials. The general contractor is obligated by law to pay such materialmen if the subcontractor fails to make payments. The surety of the subcontractor agrees to indemnify the general contractor for all losses suffered by reason of the breach of the contract by the subcontractor. The subcontractor breaches his contract and fails to pay the materialmen. There can be no doubt that it has suffered a loss by reason of the subcontractor's breach which entitles it to indemnification by the surety of the subcontractor."

Reasonable charges made by appellee against the subcontractors as rental of its own equipment or supplies furnished the subcontractors are proper claims against appellant, as the surety of the subcontractors. For, as stated by the Supreme Court in the case of *Burr v. Gardella, supra,* at page 396, in denying a petition for rehearing:

> "We think it proper to say, in addition to what is said by the District Court in its discussion of the point last mentioned in its decision, that the compensation which Burr is entitled to recover of the sureties for the use of the truck in question is limited to the reasonable value of its use during the time Keith was actually using it in the performance of the subcontract. . . ."

II.

A. Answer to Appellant's Contention That Appellee Failed to Comply With the Condition Precedent of the Bond by First Failing to Notify Appellant That the Work Was Not Commenced by February 19, 1945, and, Secondly, That the Subcontractors Did Not Erect Two Plants Each to Produce 800 Cubic Yards Per Day. (Opening Brief, p. 27.)

Appellant's main reliance in support of the above contentions is a letter dated April 5, 1945, from appellee to the subcontractors, a copy of which was sent to appellant. [Tr. pp. 463 and 464.]

That letter was sent for the sole purpose of enforcing a right reserved by appellee in the subcontract to compel the subcontractors to move in additional equipment as necessary to insure the completion of the work. [Article XII, Tr. pp. 21 and 22.]

The subcontract, itself, does not specify what character of work is required to be commenced by February 19, 1945. [Article II, Tr. p. 19.]

The evidence shows and the trial court found that "the subcontractors did commence operation about February 11, 1945, in connection with the installation of their plant necessary for the production of material" [Finding XXIX, Tr. p. 208], and the evidence shows that they started producing roughly February 25, 1945. [Tr. p. 771.]

The subcontract provides that "Duque & Frazzini to erect two plants, each to produce 800 cubic yards of suitable material to be used in connection with the contract." [Article XXI, Sec. 5, Tr. p. 25.] It does not specify when the two plants are to be erected and within what period of time each is to produce 800 cubic yards of ma-

terial. Appellee was not in need of additional material as the subcontractors were producing all it could use until it had to have material for concrete during the first part of April, 1945. [Tr. pp. 589, 590, 591.]

Based on substantial evidence, the trial court found, "that after commencing work under said subcontract and, on or about April 5, 1945, said Duque & Frazzini failed to have or thereafter to maintain sufficient workmen and/or sufficient equipment as in said subcontract required of them." [Finding IX, Tr. p. 197.]

Furthermore, as appellee was required to give notice of any alleged default within twenty days after learning of same, there is no evidence when it actually acquired knowledge of the aforesaid alleged defaults.

Appellee knew, from its records, when it first moved material, but the first material produced was stockpiled before it was removed by appellee. [Tr. p. 847.] It is true George Kovick, appellee's representative, was at the pit practically every day, but appellee, at the time, had two plants of its own operating at the same general locality which required his presence, and no inference can be drawn therefrom when he first learned of the alleged defaults on the part of the subcontractors. [Tr. pp. 771 and 772, 577 and 579, 627 and 628.]

The trial court, therefore, was justified in finding that appellee, upon acquiring knowledge of any and all failures of the subcontractors to comply with any of the provisions of the subcontract, properly complied with all conditions precedent of the bond and gave notice thereof to appellant in the manner and within the time provided in the bonds. [Finding XII, Tr. pp. 199 to 200.]

In *Johnson v. Landucci,* 21 Cal. (2d) 63, 69, the court said:

> "Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of evidence, seem equally tenable."

In *Hoppin v. Munsey,* 185 Cal. 678, 684, the court said:

> "The question of what is a reasonable time depends in each case upon its own peculiar circumstances. It is primarily a question of fact for determination of the trial court."

As no time was specified in the subcontract when the two plants referred to in appellant's brief were to be erected, it is to be presumed that they were to be erected within a rasonable time as may be determined by the trial court depending on the circumstances of the particular case.

Appellant cites the cases of *National Surety Co. v. Long,* 125 Fed. 887, and *Union Indemnity Company v. Lang, et al.,* 71 Fed. (2d) 901, in support of its position. Neither of these cases is applicable to the case at bar. In the one case in which the surety was to be immediately notified of any default, the subcontractor was to complete the construction of a building by September 1, 1901, which he failed to do and, although the owner had actual knowledge of this failure, he did not notify the surety until September 12, 1901. In the *Lang* case the subcontractor was required to weld not less than three-quarters of a mile per working day. Although the obligee on the bond knew that the subcontractor was not meeting the above

requirements, it did not notify the surety until some five weeks later.

In the case at bar, work started on the installation of the plant at least eight days prior to February 19, 1945. Production commenced between February 19 and February 25, 1945. [Tr. p. 597.] There is no evidence that appellee was aware, during this short period of six days, that material was not actually being produced or whether they acquired this information at a later date. And, if at a later date, there is no definite evidence as to when other than on or about April 5, 1945.

Conditions precedent are not favored by law and are to be strictly construed against one seeking to avail himself of them. See *Antonelle v. Lumber Co.,* 140 Cal. 309 at page 315 (73 Pac. 966).

B. Answer to Appellant's Contention That Appellee Failed to Comply With the Condition Precedent of the Bond in That It Had the Right Within 30 Days After Notice of Abandonment of the Work by the Subcontractor to Proceed or Procure Others to Proceed With the Performancce of the Contract.

Appellee contends that there is no merit to the above contention for the following reasons:

First: The project involved was an emergency war project. The subcontract agreement provided that the provisions of the original contract with the government was, by reference, made a part of said subcontract and the work was to be performed under the direction and to the satisfaction of the government engineer. [Article I, Tr. p. 18.] The bond executed by appellee specifically refers to said subcontract, stating that a copy of said subcon-

tract "is or may be hereto annexed." [Tr. p. 32.] All parties, including appellant, were therefore bound to follow the directions of the government engineer who insisted that there be no suspension of work.

Second: Above condition precedent is applicable to default and not abandonment.

In *Russell v. Ross,* 157 Cal. 174, at page 181, the court said:

> "It was the duty of plaintiffs to make the loss as light as possible. (*Winans v. Sierra Lumber Co.,* 66 Cal. 65 (4 Pac. 952).) Upon failure of Ross to complete the contract and the refusal of the surety company to have anything to do with the matter, it was clearly the right of plaintiffs to do the work themselves. (1 *Sutherland on Damages,* Sec. 91; *Bryant v. Bondwell,* 140 Cal. 490 (74 Pac. 33).)"

In *New England Equitable Insurance Co. v. Chicago Bonding & Surety Co.,* 36 Cal. App. 584, at page 585, the court said:

> "But two points are presented on this appeal. The contract provided that in the event that MacDonald should delay the work Carr might prosecute it 'if the same is not done after three days' notice.' It is claimed that Carr did not give this notice before proceeding with the work after MacDonald's abandonment, and that the surety was thereby relieved from liability. As was expressly held by this court in *Bacigalupi v. Phoenix Bldg. etc. Co.,* 14 Cal. App. 632, 639 (112 Pac. 892), notice is unnecessary where the contractor *entirely abandons the contract,* which the trial court expressly found to be the fact in the case at bar." [See Finding XIX, Tr. p. 203, and Finding XXVI, pp. 206, 207.]

Third: Appellee had a right to proceed after abandonment, in order to minimize the damage.

In *California Cotton etc. Assn. v. Byrne,* 58 Cal. App. (2d) 340, at page 345, the court said:

> "The rule is well settled that it is the duty of one who knows he is threatened with damage to do all he reasonably can do to minimize his damage. (*Vitagraph Theatres Co.,* 197 Cal. 694, 697 (242 P. 709); Civ. Code, Sec. 3354.)"

To same effect:

> *Alaska Salmon Co. v. Standard Box Co.,* 158 Cal. 567, 572;
>
> *Ash v. Soo Sing Lung,* 177 Cal. 356, 362.

In the case of *Finne v. Maryland Casualty Co.,* 173 Pac. 501 (Wash.), the situation was somewhat similar to the case at bar, the conditions precedent being almost identical and the contentions raised by the surety company were practically the same. On page 503 of the above citation, the Supreme Court of the State of Washington said:

> "But appellant also contends that, without any waiver on the part of the company, the respondents assumed control and completed the work after Hagart's default, thereby violating a condition precedent and defeating recovery. All discussion of this latter point is manifestly out of the way because, as already seen, the judgment reflects no burden or liability on account of respondent's completing the job. This provision of the bond only reserves to the surety the option to complete the work, exercise of which, or the lack of it, could in no sense, under the issues of the case, modify or change the rights and obligations of the parties as they existed at the time of the default. No prejudice is shown."

In answer to another contention that 15% of the amount was not withheld as required in the contract, the Washington State Supreme Court, in the same cited case, on page 503 stated:

> "It is plain that 15 percent of the contract price has not been squandered; but more than that amount, indeed more than the contract price with extras added, has been used to pay creditors every dollar of which diminished the bonding company's liability by just that much."

C. Answer to Contention of Appellant That Appellee Violated a Condition Precedent.

First: By changing maximum size of rock. (Opening Brief, p. 37.)

This alleged change was not made by appellee but by the government's resident engineer granted upon request of the subcontractors. [Defendant's Exhibit A, Tr. p. 876.]

Second: By changing method of measurement.

This change was made at the request of the subcontractors to save the expense of extra men and, at the same time, it allowed them a greater measurement of material. [Tr. pp. 429, 430 and 431.]

As stated by the court in the case of *Dunne Inv. Co. v. Empire State Surety Co.,* 27 Cal. App. 208, at page 219:

> "Hence, the surety company cannot put forth a substantial claim that it was injured or its rights impaired, and, therefore, cannot complain. (*Bateman Bros. v. Mapel,* 145 Cal. 241, 243 (78 Pac. 734).)"

III.

Answer to Appellant's Contention That It Did Not Waive nor Is It Estopped From Asserting Its Right to Plead Any Alleged Failure on the Part of Appellee to Comply With Any of the Conditions Precedent of the Bond. (Opening Brief, p. 40.)

First: Waiver and estoppel applicable to appellant's contention that appellee failed to give appellant notice as to (a) when subcontractors commenced work or (b) the amount of production, or (c) alleged premature payments or (d) other affirmative defenses.

On April 5, 1945, appellant had notice that the subcontractors did not commence work on February 19, 1945, nor had averaged 800 cubic yards of material per plant per day. [Plaintiff's Exhibit 4, Tr. pp. 463-464.] John H. Bray, appellant's Los Angeles Office Manager, thereupon received instruction from its San Francisco office to contact N. L. Basich, representative of appellee, and, in compliance therewith, he contacted Mr. Basich April 17 or 18, 1945, and asked Mr. Basich what the situation was. Mr. Basich then told Mr. Bray that he thought the subcontractors did not have the proper engineering set-up and organization. [Tr. pp. 696 to 699, incl.]

Mr. Bray then arranged with Mr. Basich to meet him in Tucson, Arizona, and left Los Angeles April 21, 1945, remaining in Tucson three or four days. [Tr. pp. 701 to 703, incl.]

When in Tucson, Mr. Bray inquired of the subcontractors when they commenced operation, examined their records, including payrolls, bills outstanding, discussed contents of said letter of April 5, 1945, and sought informa-

tion as to what the production was and costs thereof. [Tr. pp. 704 to 709, 798 to 799.]

He also received from appellee records of (1) payrolls, (2) truck measurements and (3) equipment rentals in reference to the subcontract. [Tr. pp. 679, 680, 713 and 714.]

On May 3, 1945, Mr. Bray, Mr. McCall, attorney for appellant, Mr. Basich and Mr. Monteleone, attorney for appellee, had a conference at which time Mr. Bray was advised that the subcontractors were not producing the required material. [Tr. pp. 721 and 722.]

Mr. Bray again, on May 10, 1945, made a trip to Tucson with a Mr. Bellou, an engineer selected by appellant to check the subcontractor's equipment. [Tr. pp. 722 and 823.]

At that time, while in Tucson, he was given information by the subcontractors of the subcontractors' payroll, rental of equipment and amount earned. [Tr. pp. 726, 803, 804 and 805.]

He then went to appellee's office and was given by it records of expenditures and earnings as applicable to the subcontract. [Tr. p. 726.]

He made another trip to Tucson on behalf of appellant and remained there May 28, 29 and 30, 1945. He was then given statements of the subcontractors' payroll, rental of equipment, bills payable and amount of material produced and was then told that the expenditures far exceeded the amount earned. [Tr. pp. 732, 733 and 734.]

Mr. Bray, in turn, sent his report to appellant's San Francisco office. [Tr. p. 713.]

In addition to the above investigation made by Mr. Bray, appellee notified appellant of the true situation on

the part of the subcontractors from April 5, 1945, up to the date of the abandonment of the work by the subcontractors on June 8, 1945. [Plaintiff's Exhibit No. 5, letter dated April 27, 1945, Tr. pp. 464 to 467, incl.; Plaintiff's Exhibit No. 7, letter dated May 15, 1945, Tr. pp. 469 to 470, incl.; Plaintiff's Exhibit No. 8, letter dated May 23, 1945, Tr. pp. 471 to 473, incl.; Plaintiff's Exhibit No. 9, letter dated May 24, 1945, Tr. pp. 474 to 476, incl.; Plaintiff's Exhibit No. 10, letter dated June 1, 1945, Tr. pp. 477 to 479, incl.; Plaintiff's Exhibit No. 12, letter dated June 8, 1945, Tr. pp. 482 to 486, incl.]

The only replies received from appellant during this period of time were two letters from J. E. McCall, appellant's attorney, mailed to appellee's attorney, one dated May 8, 1945, in which he stated, among other things, the following:

> "I was advised by Mr. Bray this morning that he called Duque & Frazzini and was told they are now turning out the required quantity of material and if necessary they will operate another shift."

Further on in the same letter he stated:

> "If any friction arises between the contractor regarding the work in question, I shall be glad to work with you in an effort to secure complete co-operation between them." [Tr. pp. 467 to 469, incl.]

In the other letter received from Mr. McCall, dated June 7, 1945, he stated, among other things, the following:

> "The subcontractors deny that they are in default in any way whatever."

Further, in the same letter, he stated:

> "I am therefore unable to understand why your client wishes to put in additional equipment to take

> care of extra work when our information received from the subcontractors and from your client is in effect that there has been no shortage of aggregates to date." [Tr. pp. 279 to 281, incl.]

Second: Waiver and estoppel applicable to any alleged right on the part of appellant to complete or procure others to complete the work after its abandonment on June 8, 1945. Appellant was notified on April 27, 1945, more than thirty days before the work was abandoned, that unless it or the subcontractors install additional equipment, appellee would do so in order to minimize the damages. [Tr. pp. 464 to 467, incl.]

Again it was requested to do something on June 1, 1945 [Tr. pp. 477 to 479]; June 8, 1945 [Tr. pp. 482 to 486]; June 11, 1945 [Tr. pp. 494, 495, 497 to 499]; June 14, 1945 [Tr. pp. 500 to 502], and June 29, 1945. [Tr. pp. 504 to 507, incl.] Yet, during all of that period of time, appellant never indicated that it desired to do anything itself in connection with the completion of this vital war project. [Tr. p. 740.]

The trial court found that there was a waiver and estoppel in favor of appellee and against appellant. [Findings XXXIII and XXXIV, Tr. pp. 210 and 211.]

In *Globe Indemnity Co. v. Unity Ry. Co.,* 272 Fed. 607, 610, the court said:

> "If he (representative of Indemnity Co.) had no authority to act for his company, his presence and participation in the conversations and conferences to further the performance of the contract is inexplicable. That he had authority to represent his company was his sole ground for taking part in the conversations and conferences."

The same conclusion must be reached as far as the authority of Mr. Bray is concerned in representing appellant.

In *Medico-Dental etc. Co. v. Horton & Converse,* 21 Cal. (2d) 411, 432, the court said:

> "Waiver may be shown by conduct; and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished. (67 C. J., par. 7, pages 304-307.)"

In *Christie v. Commercial Casualty Co.,* 6 Cal. App. (2d) 710, 719, the court said:

> "It is the established rule of law that when a surety on a bond claims that he is released from the obligation thereon because of an alteration of the instrument or on account of changed relationship of the claimant for wages, the surety must disavow his liability promptly or within a reasonable time after learning of the alteration or the surety will be bound by the bond in spite of the changed instrument or altered condition."

To same effect see

Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 772;

Perry v. Magneson, 207 Cal. 617, 621;

Fruit Growers Supply Co. v. Goss, 4 Cal. App. (2d) 651, 655.

There never was any disavowal by appellant of its obligation on its bond after it had been repeatedly informed

of the alleged acts of default on the part of the subcontractors. [Tr. p. 743.]

Appellee, therefore, contends that not only does the evidence sustain the trial court's findings on the issues of waiver and estoppel favorable to appellee [Findings XXXIII and XXXIV, Tr. pp. 210 and 211], but also the learned trial judge correctly stated the law as follows:

> "An attitude like this is like the 'indulgence' extended to one after a complaint of fraud is made and which results in delay of rescission. He who induces such indulgence is not in a position to complain of it. (*Noll v. Baida*, 1927, 202 C. 105, 198; *Hunt v. L. M. Field Inc.*, 1927, 202 C. 701, 702.)" [Tr. p. 192.]

IV.

Answer to Appellant's Contention That Appellee Concealed From Appellant the Fact That Duque & Frazzini Were in Default at Time Bond Was Accepted.

The rule has been stated in *Sherman v. American Surety Co.*, 178 Cal. 286, 290, that:

> "The principle to be deduced from these and other like decisions is that in so construing the bond no hardship is imposed upon a surety, since in entering into the contract it is deemed chargeable with notice, not only of the financial ability and integrity of the contractor, but with notice as to whether he possesses the plant, equipment, and tools required in doing the particular work or will be compelled to rent and hire the same or some part thereof, all of which matters are factors to be considered in determining the risk and upon which the surety fixes the premium exacted for executing the bond."

Not only did the trial court find against the above contention of appellant [Finding XXIX, Tr. p. 208] but its own representative, Mr. Bray, testified that his investigation disclosed that no facts were concealed. [Tr. pp. 750, 751.]

Although the bond was dated February 20, 1945, the subcontractors had made definite arrangement for the bond prior to February 7, 1945. [Tr. pp. 759, 760 and 761.]

Whatever payments were made by appellee for the account of the subcontractors from and after February 11, 1945, until the date the bond was executed on February 20, 1945, was on account of labor and were made within the terms of the subcontract.

All of the alleged matters which appellant now contends were concealed by appellee were fully disclosed to it during the progress of the work and, at no time, did appellant intimate that any facts, as now contended on appeal, were concealed. The first time this particular question was raised by appellant was in its answer in which the same was set up as an affirmative defense. For that reason, if for no other reason, it is not only estopped from asserting such contention, but, if it did have a right based on such contention, it most distinctly waived the same by its conduct.

V.

Answer to Appellant's Contention That Subcontract Was Altered by Appellee Without Its Knowledge or Consent. (Opening Brief, p. 49.)

1. Appellee at no time supervised or interfered with the subcontractors' work as contended by appellant at page 49 of its brief. As already indicated hereinabove, appellee had its own operations at the general locality distinct from that of the subcontractors in connection with the production of material. [Tr. pp. 771 and 772, 632.] That portion of the testimony of George W. Kovick quoted by appellant on page 49 of its brief referred to production of material produced by appellee's own plant at the pit, distinct from the operations of the subcontractors.

2. The fact that all employees of Duque & Frazzini were carried on appellee's payroll, or labor, supply or equipment bills were paid by checks of appellee or the fact that appellee named itself as employer in all returns and reports, as contended by appellant at page 49 of its brief, were in accordance with the terms of the subcontract as found by the trial court.

3. George W. Kovick, appellee's general superintendent, did not countermand any orders of Carson Frazzini on or about May 19, 1945, as stated on page 50 of appellant's brief. The incident therein referred to applied to the occasion when the subcontractors were prospecting for new material and were stopped by Mr. Golob, the owner of the property, and not Mr. Kovick, when they wanted to go behind his barn and house to get the material. [Tr. pp. 810 to 817, incl.; 820 to 822, incl.; 411 to 413, incl.]

4. Appellant further complains, at page 50 of its brief, that certain repairs were made to equipment on the subcontract work over the protests of Duque & Frazzini. There is a conflict of evidence whether there was any protests made by the subcontractors. Furthermore, these repairs were made on the rows of crusher of the Pioneer Plant rented by the subcontractors from appellee and they were necessary and the charges reasonable. [Tr. p. 419.]

5. The Government, and not appellee, as contended at page 50 of appellant's brief, dictated the site where material was to be taken and the selection was within the terms of the contract. [Tr. p. 409; Subcontract, Article XXI, Subsection 1, Tr. p. 25.]

6. The Government and union, not appellee, as contended on page 50 of appellant's brief, set the rate of wages of subcontractors' employees. George W. Kovick, in connection therewith, testified as follows:

> "A. It was set by the unions and also in the general specifications covering the work." [Tr. p. 617.]

7. Appellee rented equipments at the request, on behalf of, and as an accommodation to, the subcontractors without any profit to itself, the rate of rental being based on the O. P. A. rate and reasonable. [Tr. pp. 664, 665, 670, 671.]

There is no basis for any of the complaints by appellant in regard to the above for, whatever was done by appellee in connection therewith, was within the terms of the subcontract.

8. The P. D. O. C. crusher, referred to at page 50 of appellant's brief, was installed about June 1, 1945, more than 30 days after appellee notified appellant of the failure

of the subcontractors to install proper equipment as required of them by the terms of the subcontract. The installation of this crusher by appellee was made after the failure of the subcontractors or appellant to comply with the demands of appellee and in order to minimize damages and the charges were reasonable. [Plaintiff's Exhibit No. 5, Tr. pp. 464 to 467, incl.]

Appellant cited the case of *Stewart & Nuss, Inc., v. Industrial Accident Commission,* 55 Cal. App. (2d) 501, in support of the above contentions on its part. (Brief, p. 51.)

If it had quoted the entire paragraph in the case of *Stewart & Nuss, Inc., v. Industrial Accident Commission, supra,* instead of a part thereof, it is appellee's contention that what was said by the court supports appellee's rather than appellant's position. The court, in that case, clearly indicated that if the payments were advanced by the contractor to the subcontractor to meet the subcontractors' payroll and the employees were carried on the contractor's payroll in accordance with the terms of the contract, the same would be permissible and would, in no manner, impair the obligations of the surety on its bond.

In *Burlingham v. Gray,* 22 Cal. (2d) 87, quoting from *Rathburn v. Payne,* 21 Cal. (2d) 49, the court held, on page 103, "that an 'employee' on the blanket insurance policy does not fix his status as such."

In *Guarantee Ins. Co. v. Industrial Accident Commission, et al.,* 22 Cal. (2d) 516, the court, at page 520, held that "carrying payroll or mere payment of wages is not sufficient to establish relation of employer and employee."

The other contentions of appellant under Paragraph V of its opening brief, commencing on page 49, have already been answered in this brief.

VI.

Answer to Appellant's Contention That Appellee Made Premature Payments. (Opening Brief, p. 56.)

The contentions of appellant under Paragraph VI of its brief that appellee had made premature payments have already been hereinabove answered in answer to Paragraph I of appellant's brief.

VII.

Answer to Appellant's Contention That Appellee Made an Election on or Prior to June 8, 1945, to Complete the Subcontract Work, Instead of Giving Notice to Appellant as Required in the Bond and According It the Right to Proceed or Procure Others to Proceed With the Performance of the Subcontract. (Opening Brief, p. 61.)

Appellant's contention above stated has been already answered. The work was abandoned by the subcontractors on June 8, 1945. This contention of appellant has not only been answered hereinabove, but also it has been clearly and logically answered by the learned trial judge in paragraphs III and IV of the Decision and Order for Judgment and Findings. [Tr. pp. 187 and 188.]

In *United States for use of Foley v. United States Fidelity & Guaranty Co., et al.,* 113 F. (2d) 888, an almost similar situation was presented to the court. It was there stated by the court on page 890:

> "The appellee's argument suggests that regardless of Fiumara's liability to Warren Corporation, under

the Miller Act bond, Fiumara can have no recovery upon his counterclaim and third party complaint because of his failure to obtain the architect's certificate required by Article V of the subcontract as a condition precedent to Fiumara's privilege of doing the work himself and deducting the cost thereof from money due or to become due to Foley. This condition cannot prevail. Foley repeatedly refused to do the disputed work claiming it was not within the contract; he knew Fiumara was undertaking to do it himself and at no time did he suggest that Fiumara had no authority to provide the necessary labor and materials until he had obtained a certificate from the architect. Having repudiated his own obligation and having acquiesced in Fiumara's performing the work, Foley must be held to have waived the architect's certificate as a condition precedent."

So may it be said of appellant in the case at bar. Having been advised that the subcontractors abandoned their work on June 8, 1945, having been further advised that the Government was insisting on the prosecution of this vital defense project while at war, and having been further advised that appellee would proceed with the work in order to minimize the damages, appellant, by its failure to indicate that it intended to proceed with the work, must be presumed to have acquiesced in appellee proceeding, and accordingly to have waived any right to do the abandoned work itself, as surety for the subcontractors.

VIII.

Appellee Is Entitled to Recover Interest.

Appellant, while the subcontractors were operating before they abandoned the subcontract on June 8, 1945, were given all information of the amount of charges made against the subcontractors by appellee for labor, supplies and rental of equipment employed in connection with the performance of the subcontract work. These amounts were definite, fixed and reasonable. All of the records in connection therewith in appellee's possession or the subcontractors' possession were checked by its representative. [Tr. pp. 438, 439, 793, 794, 804, 827, 679, 680.] These charges were necessary, reasonable and actually applied in the performance of the subcontract. Had appellant desired a complete account at the date of the abandonment of the work by the subcontractors it was available. Although appellant filed with the court what purports to be a memorandum in reference to plaintiff's Bill of Particulars [Tr. pp. 146 to 186, incl.], it utterly failed to offer a scintilla of evidence to question the payments or reasonableness of any of the items in appellee's Bill of Particulars as amended or corrected.

The same situation applies in reference to the expenditures incurred by appellee in the completion of the work after its abandonment. The evidence shows and the trial court found that these expenditures were actually incurred and were reasonable and necessary to complete the subcontract. [Findings XVI, XVII, XIX, Tr. pp. 201, 202, 203, 204, 205.]

On June 14, 1945, appellee, after the abandonment of the subcontract, notified appellant as follows:

> "Unless we hear from you upon receipt hereof of other plans you have to complete this contract, we

> will assume it is your desire that we complete the same for you as the insurer of the subcontractors. All of our records of costs and other matters connected therewith are at your disposal and we will furnish you with whatever information you may request." [Plaintiff's Exhibit No. 16, Tr. pp. 500, 501, 502.]

Again, on June 29, 1945, appellee's attorney wrote to appellant's attorney as follows:

> "Whatever data you or your client may request, including items of expenditure, will be furnished you upon request and the records of my client are open for your inspection at any time." [Tr. pp. 504 to 507, incl.]

During the trial, appellee produced in court eight boxes of records and, when made available to appellant, its counsel made the following statement in open court:

> "May it please the court, to clarify the position of defendant, and possibly save more time, it is not our position that the payments alleged were not made. It is only our position that the defendant is not liable for the amounts paid for various reasons which we have shown or can show. We admit they made payments, but because they were premature and for other reasons the defendant is not liable." [Tr. pp. 405, 406.]

Thereafter, defendant made no contention, during the trial, nor offered any evidence, that these expenditures were not reasonable or necessary. The trial court was not called upon, therefore, to determine any issue in reference to the actual payment or reasonableness or necessity of these expenditures and for that reason the cases of *Perry v. Magneson,* 207 Cal. 617, and *Indemnity Ins. Co. of N. A. v. Watson,* 128 Cal. App. 10, 16, cited by appellant,

are not applicable. In those cited cases, not only was there an issue made at the trial as to the actual payment or reasonableness of the expenditures calling for a determination by the court, but the court found against the amount claimed by the plaintiffs.

The items of expenditures, as shown in plaintiff's Bill of Particulars, up to the date of the abandonment on June 8, 1945, in the case at bar, were then certain and determined and, on those items, which then became due under the subcontract and bond, appellee is entitled to interest from that date. The items in reference to the completion of the job after its abandonment, as shown in the Bill of Particulars, were certain and definite at its completion on October 25, 1945, and, for that reason, appellee is entitled to interest on those items from October 25, 1945. On June 8, 1945, appellee notified appellant and the subcontractors that, unless the subcontractors comply with their obligations within three days, appellee contemplated using all reasonable means to meet this requirement in order to minimize the damages and charge all expenses in that regard, including operating expenses, against them. [Plaintiff's Exhibit 12, Tr. pp. 482 to 486, incl.]

In *Indemnity Ins. Co. v. Watson,* 128 Cal. App. 10, 21, cited by appellant, the court said:

> "The general rule with respect to the allowance of interest is that where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. (*Gray v. Bekins,* 186 Cal. 389, 399 (199 Pac. 767); *Perry v. Magneson,* 207 Cal. 617, 623 (279 Pac. 650); 14 Cal. Jur., p. 678.)"

In *Lasky v. American Indemnity Co.,* 102 Cal. App. 192, at page 198, the court said:

> "Defendant, for the first time in its supplemental brief, filed after oral argument, urges, upon the authority of *Perry v. Magneson,* 207 Cal. 617 (279 Pac. 650), that the judgment is erroneous in allowing interest from the date of the filing of the complaint. The cited case holds that in an action by an owner to recover the cost of completion of building abandoned by the contractors, from the surety on a bond to save such owner harmless from loss resulting from a breach of the building contract, interest from the commencement of the action should not be allowed, where the evidence is conflicting as to such cost and the amount thereof is uncertain, till determined by judgment. Since defendant has utterly failed to print in its brief any portion of the testimony showing that the cost of completion was disputed by it at the trial, we may assume as correct plaintiff's assertion in their reply brief that no such dispute occurred and that the case was tried upon the theory that such cost was certain. (*Firpo v. Pacific Mut. Life Ins. Co.,* 80 Cal. App. 122 (251 Pac. 657).) If the parties treated such cost as certain, the court properly allowed interest from the date of filing the complaint."

Appellant, after the work was abandoned by the subcontractors on June 8, 1945, forced appellee to use its own money to finance the completion of the work without profit or compensation for overhead. Therefore, appellee should be allowed interest on all moneys advanced by it for the benefit and with full knowledge on the part of appellant from the date the advancements were determined and made certain until that money is repaid.

IX.

Trial Court Did Not Err in Permitting George J. Popovich to Testify in Reference to Items in Bill of Particulars.

This witness was secretary and office manager of appellee, and has had experience as an accountant, having passed the certified public accountant's examination of the State of California. [Tr. p. 318.]

He arranged the system of keeping account of the expenses or moneys paid out in connection with the subcontract work. [Tr. p. 321.]

Those records were kept in the ordinary course of business and the above system adopted by this witness was a system usually adopted by contractors in work of that kind. [Tr. p. 322.]

This witness was asked to state from what data schedule I, payroll of plaintiff's Bill of Particulars, was prepared. When this question was asked, the following took place:

> "A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.
>
> Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence." [Tr. p. 323.]

Then followed the proceedings set forth on page 70 of appellant's brief.

No motion was made to strike the above answer given by the witness before the above objection was made; no other objection, at any other time, was made to the testimony of this witness, nor at any time was his qualification questioned nor was any motion made to strike out his testimony in any other respect.

Although the data in the Bill of Particulars was compiled by Homer Thompson, the same under the supervision of Mr. Popovich. [Tr. p. 324.]

The payroll records of Duque & Frazzini were prepared under the direction of Carson Frazzini in the ordinary course of business. [Tr. p. 836.]

Appellee's records of the quantities of material removed, payroll and rental of equipment were kept in the ordinary course of business and correctly portrays the actual condition as it existed. [Tr. p. 670.]

Counsel for appellant, on page 74 of the opening brief, states:

> "No books or records of any kind from which the Bill of Particulars was purportedly compiled, were offered by appellee in evidence or even for identification."

During the trial the court suggested that all records be brought into court to make its ruling correct in permitting in evidence a summary of the records as set forth in the corrected Bill of Particulars. Accordingly, eight boxes of original records were brought into court and made available which appellant conceded showed that the payments were made. [Tr. pp. 404, 405, 406.]

The case of *People v. Doble,* 203 Cal. 510, 514, cited by appellant in its brief, holds that such summary is admissible so long as the records are available to the opposing party. For on page 514 of the above case the court said:

> "We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party. . . ."

In addition thereto, appellant had Mr. Vernon, its auditor, check those records previously consuming several weeks, and, although he testified, he did not question a single item. [Tr. pp. 434 to 439, incl.]

In *Johnson v. Morris*, 210 Cal. 580, 587, the court held that a public accountant could give a summary of accounts prepared by him and an assistant under his supervision and control.

In *Wilson v. Alcatraz Asphalt Co.,* 142 Cal. 182, at page 189, the court held that it was not error to permit a witness to summarize the testimony as to oil purchased by defendants from other parties. The court there stated:

> "The course pursued was the proper one. (Code Civ. Proc., sec. 1855, subd. 5; Greenleaf on Evidence, 16th ed., sec. 563h, and cases cited.) There was in fact no dispute as to the figures. . . ."

In *McPherson v. Milling Co.,* 44 Cal. App. 491, 495, the court said:

> "There is no contention that the statement was not correct as a summary of what the books showed nor that they were not correct. The appellant had it in its power to show any error in either in the trial court."

The entire Bill of Particulars, as amended and corrected, filed by appellee, was taken from records kept in the ordinary course of business and comes within the provision of Section 695 of Title 28, United States Code, Annotated.

Appellant not only admitted that the payments were made [Tr. p. 405] but also had an expert check all of the records. [Tr. pp. 438 and 439.]

The only objection made by appellant to the testimony of witness George P. Popovich, as hereinabove indicated, was that the "Payrolls themselves would be the best evidence." [Tr. p. 323.]

On page 70 of its opening brief, appellant's counsel charges that there was a misrepresentation to the court that the original records were in court. This statement is unwarranted. Original records were in court at the particular time although not all of them. The following proceedings then took place while the witness was on the witness stand:

> "Q. Will you submit to the court tomorrow morning when you return the names of the employees on the first page of Schedule XXX? A. Yes, sir, we will bring all our records here.
>
> Mr. Monteleone: Mr. McCall, there are four boxes of them. We will be willing to bring the four boxes of daily payroll records.
>
> Mr. McCall: Of course, we are not asking you to do such a job as that. . . ." [Tr. p. 397.]

> "Mr. Monteleone: Mr. McCall, do you want us to bring in the payroll records tomorrow?
>
> Mr. McCall: I am not stating to the plaintiff what records to show.
>
> The Court: I think to be safe, in order to make any ruling correct, you should bring in everything that you have." [Tr. p. 404.]

After eight boxes of original records were brought in court, Mr. McCall stated in open court that "it is not our position that the payments alleged here were not made." [Tr. p. 405.]

In response to the above admission by appellant's counsel, the court said:

> "Had you admitted they were made and merely questioned the validity we would have saved a day yesterday." [Tr. p. 406.]

In *Stuyvesant Ins. Co. v. Sussex Fire Ins. Co.*, 90 F. (2d) 281, at page 283, the court said:

> "We do not feel that these exceptions are important as the facts which it was intended thereby to prove, so far as relevant, have been stated or admitted by counsel in the record, and all the parties appear to be agreed as to what the facts are by statements in their brief."

As the evidence shows, without contradiction, that all of the records involved were correctly made in the ordinary course of business, any attempt to question a summary made therefrom, after the originals were made available to appellant, is, we contend, without merit.

Homer Thompson, who actually kept the books of appellee in the field, was in court to testify but in view of the admission by appellant's counsel that it was not his position that the payments alleged in the bill of particulars were not made, he was not called to the witness stand. [Tr. pp. 433, 434.]

X.

Answer to Appellant's Contention That Surety's Obligation Measured Only by the Terms of the Bond.

In support of the above contention, appellant cites the case of *Pacific Automotive Device Co. v. U. S. F. & G. Co.,* 15 F. (2d) 164, 165. Appellee has no quarrel with the law as therein stated but does contend that the facts therein are radically different than the case at bar. A more analogous situation is found in the case of *Ryan v. Shannahan,* 209 Cal. 98, at page 103, where the court said:

> "Furthermore, as above stated, a copy of the contract was attached to the bond and it is impossible to properly construe the language of the undertaking other than in the light of the contract, the faithful performance of which is secured."

Conclusion.

We submit that the only action appellant has taken in connection with the project involved was to accept the premium, send a representative to investigate the numerous complaints made by appellee and, after threatened with a lawsuit, raise highly technical defenses.

We submit appellee did everything that a reasonably prudent person would do under the circumstances. The attitude and conduct on the part of the appellant surety throughout this whole matter was aptly described by the learned trial judge "like the 'indulgence' extended to one

after a complaint of fraud is made and which results in a delay of rescission."

Appellee respectfully submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

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